Chen Ying @ Chin Ying v Export-Import Bank of Malaysia Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03(IM)(NCC)-80–09 OF 2015
ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA
9 JUNE 2016

Civil Procedure — Stay of proceedings — Bankruptcy proceedings — Trial court dismissed appellant's application for stay of bankruptcy proceedings — Test for stay of bankruptcy proceedings — Whether appellant's application met 'sufficient reason' test prescribed under s 97 of the Bankruptcy Act 1967

The respondent granted USD70m loan facility to a company known as Shenyang Shenyang Amusement Park Co Ltd ('the borrower') to part finance the development, construction and completion of an amusement park in Shenyang, China. The repayment of the loan facility was secured by the appellant and three others as guarantors. The borrower defaulted and the respondent subsequently sued all the guarantors to recover the outstanding sum. The civil court gave judgment in favour of the respondent and all the subsequent appeals by the appellant up until the Federal Court level were dismissed. The appellant then filed two separate applications, firstly, for a stay of execution of the judgment and secondly, to stay the bankruptcy proceedings pending the determination of a civil suit that the respondent had filed in China against the borrower and pending the realisation of the securities held by the respondent. The first application was dismissed both by the trial court and later by the Court of Appeal. The second application to stay the bankruptcy proceedings was also dismissed by the trial court. The learned trial court judge was of the view that there was no sufficient reason which merits the stay. The present appeal was in respect of the application to stay the bankruptcy proceedings.

Held, allowing the appeal and setting aside the decision of the High Court with costs in the cause:

(1) In an application for stay of enforcement or execution of judgment, the test should rightly by 'special circumstances' whereas the test for a stay of bankruptcy proceedings as enunciated under s 97 of the Bankruptcy Act 1967 ('the Act') is the provision of 'sufficient reason'. In considering whether to exercise its discretion and grant a stay of the bankruptcy proceedings, there must be sufficient reason placed before the court to persuade the court to grant that order. This test is set on a lower burden

than the test of 'special circumstances' in relation to the execution of court orders or judgments (see paras 17 & 32).

(2) The appellant's application for stay has merit and had met the test prescribed under s 97. The two reasons offered were credible and real options that the respondent had itself considered and more importantly, acted upon. The respondent had embarked on a course of action against the principal borrower before the Higher People's Court in Liaoning Province in China which was still pending. Although this ground was abandoned in these proceedings, the existence of this course of conduct on the part of the respondent could not be ignored. As for the realisation of securities, while the respondent was entitled to not realise those assets before it enforces against the appellant, the value of the securities were not seriously challenged. These securities were substantial with forced sale values which were certainly more than adequate to satisfy the judgment debt (see paras 35–36).

(3) The setting of a lower standard in s 97 of the Act is intended to protect debtors such as the appellant. For the respondent to just merely express that it was entitled to commence bankruptcy proceedings would be to render the object and intent of s 97 of the Act illusory and of no real and substantive effect or meaning. Bankruptcy proceedings, being personal in nature must be courses of action of the last and final resort; not the first. It, therefore, stands to reason that the realisation of the valuable securities would be the immediate and more effective mode of execution towards satisfaction of a judgment debt, even if the contract had given the respondent the option of whether or not to proceed. The contractual rights ought to be read subject to statutory provisions (see para 39).

[Bahasa Malaysia summary

Responden diberikan USD70 juta kemudahan pinjaman kepada sebuah syarikat yang dikenali sebagai Shenyang Shenyang Amusement Park Co Ltd ('peminjam') untuk membiayai sebahagian daripada pembangunan, pembinaan dan penyiapan taman hiburan di Shenyang, China. Pembayaran balik kemudahan pinjaman telah diperolehi oleh perayu dan tiga yang lain sebagai penjamin-penjamin. Peminjam ingkar dan responden dengan itu menyaman semua penjamin untuk mendapatkan semula jumlah yang belum dijelaskan. Mahkamah sivil membuat dapatan memihak kepada responden dan semua rayuan berikutnya oleh perayu sehingga peringkat Mahkamah Persekutuan telah ditolak. Perayu kemudiannya memfailkan dua permohonan yang berasingan, pertama, untuk menangguhkan pelaksanaan penghakiman dan kedua, untuk menggantung prosiding kebankrapan sementara menunggu penentuan guaman sivil bahawa responden telah memfailkan di China terhadap peminjam dan sementara merealisasikan sekuriti yang dipegang oleh responden. Permohonan pertama telah ditolak oleh mahkamah perbicaraan dan kemudiannya oleh Mahkamah Rayuan. Permohonan kedua untuk

menangguhkan prosiding kebankrapan juga ditolak oleh mahkamah perbicaraan. Hakim mahkamah perbicaraan yang bijaksana berpendapat bahawa tiada alasan yang mencukupi yang mewajarkan penggantungan. Rayuan ini adalah berkenaan dengan permohonan untuk menangguhkan prosiding kebankrapan.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi dengan kos dalam kausa:

(1) Dalam satu permohonan untuk penggantungan penguatkuasaan atau pelaksanaan penghakiman, ujian sewajarnya melalui 'keadaan khas' manakala ujian untuk satu penggantungan prosiding kebankrapan seperti yang dinyatakan di bawah s 97 Akta Kebankrapan 1967 ('Akta') adalah peruntukan 'sebab yang mencukupi'. Dalam menimbangkan sama ada untuk menggunakan budi bicara dan membenarkan penggantungan prosiding kebankrapan, perlu ada sebab yang mencukupi diberikan di hadapan mahkamah untuk memohon mahkamah untuk memberikan perintah tersebut. Ujian ini ditetapkan pada beban yang lebih rendah daripada ujian 'keadaan khas' berhubung dengan pelaksanaan perintah mahkamah atau penghakiman (lihat perenggan 17 & 32).

(2) Permohonan perayu untuk penggantungan mempunyai merit dan telah memenuhi ujian yang ditetapkan di bawah s 97. Dua alasan yang ditawarkan adalah boleh dipercayai dan pilihan sebenar yang dipertimbangkan dengan sendirinya oleh responden dan yang lebih utama, diambil tindakan. Responden telah memulakan satu kausa tindakan terhadap peminjam utama di hadapan Mahkamah Tinggi Rakyat di Wilayah Liaoning di China yang masih belum selesai. Walaupun alasan ini ditinggalkan dalam prosiding ini, kewujudan kausa tindakan ini bagi pihak responden tidak boleh diabaikan. Untuk merealisasikan sekuriti, sementara responden berhak tidak merealisasikan aset sebelum dikuatkuasakan terhadap perayu, nilai sekuriti itu tidak dicabar secara serius. Sekuriti ini adalah besar dengan nilai jualan paksa yang sudah tentu lebih daripada mencukupi untuk membayar hutang penghakiman (lihat perenggan 35–36).

(3) Penetapan standard yang lebih rendah dalam s 97 Akta adalah bertujuan untuk melindungi penghutang seperti perayu. Untuk responden hanya sekadar menyatakan bahawa ia berhak untuk memulakan prosiding kebankrapan menjadikan tujuan dan maksud s 97 Akta sebagai khayalan dan tidak mempunyai kesan sebenar dan substantif atau makna. Prosiding kebankrapan, yang bersifat peribadi mestilah kausa tindakan pilihan terakhir dan muktamad; bukan yang pertama. Oleh itu, dengan alasan bahawa merealisasikan sekuriti berharga akan menjadi mod pelaksanaan segera dan lebih berkesan untuk menunaikan hutang

penghakiman, walaupun kontrak telah memberikan responden pilihan sama ada atau tidak untuk meneruskan. Hak kontraktual seharusnya dibaca tertakluk kepada peruntukan undang-undang (lihat perenggan 39).]

Notes

For cases on bankruptcy proceedings, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 8606–8611.

Cases referred to

Bank Bumiputera (M) Bhd v Doric Development Sdn Bhd & 2 Ors [1988] 1 MLJ 462 (refd)

Bank Bumiputra Malaysia Bhd v Esah bt Adul Ghani [1986] 1 MLJ 16, SC (refd)

Bungsar Hill Holdings Sdn Bhd v Dr Amir Farid Datuk Isahak [2003] 4 MLJ 1; [2005] 2 CLJ 809, CA (refd)

Chor Saw Oon; ex p Tan Jiak Chye, Re [2001] 6 MLJ 61, HC (refd)

Duncan, Fox & Co v North and South Wales Bank (1880) LR 7 HL 348, HL (refd)

J Raju @ Jayaraman s/o M Kerpaya; Ex p OCBC Bank (M) Bhd, Re [1999] 4 MLJ 593

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)

Malayan Banking Bhd v Datuk Lim Kheng Khim [1992] 2 MLJ 540; [1992] 3 CLJ 1616, HC (refd)

Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49, CA (refd)

Noble (a Bankrupt), Ex parte Bankrupt v The Official Receiver and another, Re [1965] Ch 129, CA (refd)

Rosli Abdul Kadir; ex p Bank Kerjasama Rakyat Malaysia Bhd, Re [2008] 5 CLJ 681, HC (refd)

Tosrin bin Jarvanthi, ex p Equity Finance Corp Bhd, Re [1989] 3 MLJ 428; [1989] 2 CLJ 1057, HC (refd)

Legislation referred to

Bankruptcy Act 1967 s 97

Appeal from: Bankruptcy Case No 29NCC-2673–05 of 2014 (High Court, Kuala Lumpur)

Lee Hong Yap (HY Lee & Co) for the appellant.
Trevor Padasian (Aw Ee Va with him) (Skrine) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] This was an appeal against a refusal to exercise discretion and grant a stay of execution. The learned High Court judge did not find the circumstances presented as special warranting an exercise of discretion in the appellant's favour. We unanimously found that exercise to be erroneous and we accordingly intervened to allow the appeal. These are our full reasons for our decision.

RELEVANT FACTS

[2] The respondent granted a principal aggregate sum of USD70m term loan facility under the overseas project financing ('facility') to a company known as Shenyang Shenyang Amusement Park Co Ltd ('borrower'). The facility was to part finance the development, construction and completion of an amusement park and a commercial complex known as 'Magic Goat Paradise' in Shenyang, China ('project'). The project was being undertaken by the borrower on leasehold lands No 05208002 (TXGY (2005) No 17) (113778 sqmt)) and 05208004 (TXGY (2005) No 18) (1263 sqmt)). The land use rights of the project lands were registered to the borrower.

[3] The repayment of the facility was secured by the appellant and three others through a joint and several guarantee agreement dated 29 May 2007 in favour of the respondent. Another company known as Harapan Serentak Sdn Bhd also gave a corporate guarantee for the same facility while a mortgage contract dated 29 May 2007 was executed in respect of the project lands.

[4] The borrower defaulted. On 2 August 2013, the respondent sued the borrower and all the guarantors seeking to recover the outstanding sum of USD78,249,610.85 as at 11 October 2013 together with interest thereon at the rate of 5%pa from the date of filing to the date of full settlement ('civil suit'). After a full trial, the court gave judgment in favour of the respondent on 28 February 2014. The appellant's appeal to the Court of Appeal was dismissed on 8 October 2014. The appellant then sought leave to appeal to the Federal Court. He failed to secure leave. His application was dismissed on 10 March 2015.

[5] Meanwhile, bankruptcy proceedings were initiated against the appellant. A request for issue of bankruptcy notice was filed on 28 May 2014. To this, the appellant applied for stay pending the disposal of his application for leave to appeal to the Federal Court. This application was filed on 23 December 2014. When leave was refused on 10 March 2015, the appellant withdrew this application.

[6] He then filed a stay in the civil suit on 29 March 2015. This was to stay all forms of execution of the judgment dated 28 February 2014 pending the determination of a civil suit that the respondent had filed in China against the borrower ('China suit'); and pending the realisation of the securities held by the respondent. The respondent referred to this as the 'civil suit stay application'. This application was dismissed on 8 June 2015 by the High Court. The Court of Appeal affirmed that decision on 23 November 2015.

[7] On that same date, 29 March 2015, the appellant also filed another application to stay the bankruptcy proceedings. He also cited the same reasons that were relied on in the 'civil suit stay application'; that is, the China suit and the realisation of securities. This is apparent from the affidavit of the appellant affirmed on 26 March 2015.

[8] The application for stay in the bankruptcy proceedings was dismissed. The learned High Court judge was of the considered opinion that 'there is no sufficient reason which merits the stay'.

THE DECISION OF THE COURT OF APPEAL

[9] We are fully aware that the test under s 97 of the Bankruptcy Act 1967 is the provision of 'sufficient reason' and not 'special circumstances', the test for stay of execution of an order pending an appeal. It is our view that contrary to the views of the learned High Court judge, the exercise of discretion on the sufficiency of reason offered by the appellant is with respect, erroneous. We, unanimously opined that the reasons offered have more than adequately met the threshold of 'sufficient reason' under s 97 and that a stay of the bankruptcy proceedings ought to have been granted and we do so accordingly.

[10] For ease of reference, we shall refer to the High Court from where the present appeal emanates as the 'bankruptcy court'. This is to distinguish these proceedings from those in the substantive civil action which we shall refer to as the 'Civil Action'.

[11] It was the decision of the bankruptcy court that the reasons offered, the realisation of the land by the respondent and the conclusion of the China suit were not sufficient reasons to warrant a stay. It was the court's view that first of all, the validity of the judgment on which the creditor's petition or CP is founded had been duly ventilated and determined up to the Federal Court. Second, there is no requirement for the respondent to first realise the securities and/or pursue action against the other parties before the respondent may proceed against the appellant debtor as guarantor. This is because the liability of the appellant arises under or from the guarantee agreement and not from the mortgage contract. And, cl 2.5 of the guarantee agreement provides that the

respondent is 'entitled to enforce its rights hereunder against the joint and several guarantors without first having to seek recourse or otherwise exercise its remedies against the borrower for the recovery of the indebtedness under the provisions of the facility agreement'.

[12] The bankruptcy court declined to follow *Re Tosrin bin Jarvanthi, ex p Equity Finance Corp Bhd* [1989] 3 MLJ 428; [1989] 2 CLJ 1057 (we believe the correct citation is *Re Tosrin bin Jarvanthi, ex p Equity Finance Corp Bhd* [1989] 3 MLJ 428; [1989] 2 CLJ 1057, a decision by LC Vohrah J (as he then was) and we shall so cite it). The bankruptcy court distinguished the case on the facts, that the 'foreclosure proceedings were already afoot when the stay was granted'. In the instant case before the bankruptcy court, 'there is not even a step taken by the JC to realise the land for a reason best known to them in which it is immaterial before this court. Hence, at this stage, more consideration and protection should be given to the JC who had to wait any longer in order to enforce the judgment if a stay is allowed'.

[13] The bankruptcy court also distinguished the facts in *Bungsar Hill Holdings Sdn Bhd v Dr Amir Farid Datuk Isahak* [2003] 4 MLJ 1; [2005] 2 CLJ 809 thereby justifying why the decision was not followed. In that case, the judgment debtor, Dr Amir was adjudged a bankrupt on 29 July 1994. He was in partnership with two other doctors of a clinic known as 'Poliklinik Kotaraya' The partners fell into dispute and several suits were filed. This led to the appointment of interim receivers and managers and a subsequent sale of the partnership. The Federal Court agreed with the Court of Appeal that Dr Amir was solvent and was able to pay his debt as he had assets as at the date the receiving and adjudication orders were made. Monies would become due and payable to Dr Amir upon the completion of the liquidation of the partnership on the date of the adjudication of bankruptcy.

[14] In the present case before the bankruptcy court, the appellant had 'no asset or possible asset' belonging to the appellant. According to the bankruptcy court, 'a mere reliance on the valuation report made in respect of the land has no probative force to this court to believe that the JD is a solvent person'. This was because the security or project lands did not belong to the appellant. Secondly, 'there are plethora of cases which emphasise the liability of a guarantor would not be affected by the realisation of other securities'.

[15] The bankruptcy court chose instead to follow the decision in *Re J Raju @ Jayaraman s/o M Kerpaya; Ex p OCBC Bank (M) Bhd* [1999] 4 MLJ 593. In that decision, the High Court had dismissed the several applications for stay, one of which was pending the auction sale of charged properties. The court there was of the view that 'such a course of action would be contrary to the established authorities of *Re Tosrin bin Jarvanthi, ex p Equity Finance Corp Bhd*

A [1989] 3 MLJ 428; [1989] 2 CLJ 1057 and *Bank Bumiputera (M) Bhd v Doric Development Sdn Bhd & 2 Ors* [1988] 1 MLJ 462. These authorities clearly does not support such a proposition. On the contrary, it lays down the principles that where securities are given for the debt upon which the bankruptcy proceedings are based, this would not preclude the granting of B adjudication and receiving orders against the debtor before realisation of the properties'.

[16] Finally, the bankruptcy court found that since the stay application was based on the same reason that was relied on in the civil suit stay application filed C in the civil action, which application had already been dismissed, 'there is also no reason for a stay to be granted for this application'.

[17] We believe it is important to be reminded of the different considerations at play. In an application for stay of enforcement or execution of judgment, the D test should rightly by 'special circumstances.' This has long been the abiding test – see *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49. That, however, is not the test for a stay of bankruptcy proceedings. The test as enunciated in s 97 itself is the provision of sufficient E reason.

[18] The important distinction between these two tests for stay was carefully explained by Ramly J (as His Lordship then was) in *Re Rosli Abdul Kadir; ex p Bank Kerjasama Rakyat Malaysia Bhd* [2008] 5 CLJ 681: F

> [6] The test of 'special circumstances' or 'special grounds' is distinct from the test of 'sufficient reason' in its principle, legal meaning, weight to the test, degree of burden to be proved to satisfy the court and particular facts that need to be adduced to pass each test. Even the words 'special' and 'sufficient; are different in the ordinary meanings. G
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> Certainly, the weight and degree of burden to be proved to satisfy the court in 'special circumstances' test is higher than the 'sufficient reason; test and the weight and the degree of burden to be proved to satisfy the Court in 'sufficient reason 'test is lower than in the 'special circumstances' test. To quote the words of Abdul Hamid Mohamad JCA (as he then was) in *Ming Ann Holdings Sdn bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49; [2002] 3 CLJ 380, CA: H
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> > ... the special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal).
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> I As such the degree that needs to be passed under 'special circumstances' test is beyond the 'sufficient reasons'.

[19] The difference between the two tests becomes more apparent when we take heed of the subsequent discussions by the same judge. His Lordship

compared the approach of our local courts under s 97 with that under the English regime and found it to be generally the same. His Lordship found that reasons which would not have met the 'special circumstances' test may however, pass the lower test of 'sufficient reason'.

In the English decision of *Re Noble (a Bankrupt), Ex parte Bankrupt v The Official Receiver and another* [1965] Ch 129, a stay pending a 'bona fide' appeal was considered a proper exercise of discretion in an application for stay of bankruptcy proceedings.

[20] Similarly, in *Malayan Banking Bhd v Datuk Lim Kheng Khim* [1992] 2 MLJ 540; [1992] 3 CLJ 1616, it is proper to stay further bankruptcy proceedings until the hearing of an appeal on some serious points of law. Generally, it would be correct to say that these reasons, which relate to the merits of the appeal would not pass muster as 'special circumstances' why the order of the court should not be executed or implemented. In bankruptcy proceedings, these same reasons have been found to be sufficient to warrant a stay.

[21] In His Lordship's view, the stay of the bankruptcy proceedings will not restrain the judgment creditor from proceeding with any other form of execution or enforcement that is available to the judgment creditor. Where bankruptcy proceedings are stayed or postponed, the judgment creditor is not deprived the 'fruits of litigation'. Quite aside from the fact that this is specific power granted by Parliament, to which the courts must give heed, the court has also taken into consideration the effect and impact of an adjudication order and a receiving order are quite extensive. It disqualifies the judgment debtor from holding public office and practising in various professions, carrying on business alone or in partnership or by way of a company. Even maintaining actions would generally require prior sanction of the director general of insolvency. The bankrupt's movements overseas are also curtailed.

[22] Hence, the general impact of the bankruptcy proceedings cannot be overstated. This explains the specific enactment of both the power and the test within the Bankruptcy Act on this matter of stay. We cannot agree more with that reasoning.

[23] Having examined *Re J Raju @ Jayaraman s/o M Kerpaya; Ex p OCBC Bank (M) Bhd* very carefully, we are further inclined to say that the peculiar facts in that case merited the dismissal of the applications for stay although a careful read of the case seems to indicate that the High Court actually applied a 'special circumstances' test as opposed to the correct test of 'sufficient reason'. Because the matter had already been unduly prolonged with multiple stay applications, we can understand why the High Court was disinclined to grant a further stay.

[24] Now, the High Court in *Re J Raju @ Jayaraman s/o M Kerpaya* had also cited the decisions of *Re Tosrin Jarvanthi, ex p Equity Finance Bhd* and *Bank Bumiputera (M) Bhd v Doric Development Sdn Bhd & 2 Ors;* two decisions which the bankruptcy court felt that it was obliged to follow. It is ideal that we examine those two decisions.

[25] In *Re Tosrin Jarvanthi, ex p Equity Finance Bhd* , the court felt that a stay ought to be granted where 'undue hardship might be caused to a judgment debtor'. LC Vohrah J expressed the view that the court plays a 'protective role' in bankruptcy matters. We agree with that approach. In our opinion, that role is not so much to look to the interests of the creditor petitioner, but those of the debtor. This is implicit in the terms of s 97 as the provision empowers the court to grant a stay of bankruptcy proceedings, whether entirely (altogether) or for a limited time, and whether to impose '... terms and ... conditions as the court thinks just'.

[26] As for the decision in *Bank Bumiputera (M) Bhd v Doric Development Sdn Bhd & 2 Ors* , the central argument was an application for stay of proceedings against the guarantors pending foreclosure proceedings in order to avoid double recovery. That argument was rejected. Instead, the High Court relied on and applied the Federal Court's decision in *Bank Bumiputra Malaysia Bhd v Esah bt Adul Ghani* [1986] 1 MLJ 16 for the proposition that in the absence of any express condition requiring that foreclosure proceedings be proceeded with and completed first before the guarantors may be sued, the Federal Court had held that the bank was not compelled to sue the principal debtor or the company first. Hence, it was perfectly proper to proceed against the guarantors. In support, the Federal Court cited with approval Lord Westbury's dicta in *Duncan, Fox & Co v North and South Wales Bank* (1880) LR 7 HL 348:

> Until a debtor has fulfilled his end of the bargain or contract, he is in no position nor does he have a right to dictate any terms, to prescribe any duty, or to make any demand on his creditor. The creditor must be left in possession of the whole of the remedies which the original contract gave him, and he must be left unfettered and at liberty to exhaust those remedies, and he cannot be required to put any limitation upon the course of legal action given to him by his contract by any person who is still his debtor, except upon the terms of that debt being completely satisfied.

[27] In stating the above, the Federal Court did say that this was of course, subject to any express terms to the contrary in the underlying contract between the parties. Again, a careful reading of the facts in that Federal Court's decision will readily show that the view was expressed in relation to an appeal against an order staying a creditor's petition against a surety. The surety had filed a notice of intention to oppose the petition thus preventing a receiving order being made against her. The court granted a stay of the petition pending the decision

of the petition against the principal debtor, taking the view that not proceeding with foreclosure proceedings against the principal 'albeit may be legal', the bank was in fact in 'abuse of the process of the court'.

[28] The Federal Court disagreed. It 'pointed out that we are not concerned with moral but legal problem …'. The Federal Court expressed that:

> We appreciate the good intention of the learned judge in making the order of stay. Whatever the learned judge may think about the matter, we do not think, in the circumstances, he has the jurisdiction either to dismiss or to stay the creditor's petition.

[29] The operation or application of s 97 of the Bankruptcy Act was neither discussed nor considered by the Federal Court in that decision. It would appear that the s 97 was not even drawn to the court's attention.

[30] Regardless, we opine that the decisions in *Re Tosrin Jarvanthi, ex p Equity Finance Bhd* and *Re Rosli Abdul Kadir; ex p Bank Kerjasama Rakyat Malaysia Bhd* are cases on point. Both decisions specifically considered s 97, concluding that in an application for stay of bankruptcy proceedings, the test is provided in the substantive law itself. A similar view was expressed in *Re Chor Saw Oon; ex p Tan Jiak Chye* [2001] 6 MLJ 61.

[31] Section 97 of the Bankruptcy Act 1967 states:

> The court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to conditions as the court thinks just.

[32] We agree. We are of the opinion that express statutory provision cannot be ignored nor can we try and draw parallels with the other test of stays of enforcement or execution of orders. In considering whether to exercise its discretion and grant a stay of the bankruptcy proceedings, there must be sufficient reason placed before the court to persuade the court to grant that order. This test is set on a lower burden than the test of 'special circumstances' in relation to the execution of court orders or judgments. This is understandable given the far-reaching consequences of not just a receiving order but an adjudication order. These orders have immediate operative effect on not just the assets of the debtor now adjudged a 'bankrupt' but also the qualifications of the adjudged bankrupt to occupy positions of public office and the like. These statutory disqualifications cannot be downplayed.

[33] It is also pertinent to note that the power to stay under s 97 is one which may be exercised at any time of the bankruptcy petition. The power is best exercised when the petition is yet to be disposed. Arguably, where the petition

has already been made, there is no longer a petition to speak of but adjudication orders and receiving orders. In that instance, the proper application is one to set aside those orders.

[34] Two reasons have been proffered as satisfying the test of 'sufficient reason' for a stay, the existence and realisation of securities and the China suit. The respondent has contended that the realisation of securities and the taking of action against the appellant may be conducted simultaneously, as seen in the line of cases already discussed above. In any case, the appellant cannot rely on the realisation of the properties as these do not belong to the appellant in the first place.

[35] It is our considered view that the appellant's application for stay has merit and has met the test prescribed under s 97. The two reasons offered are not only credible but are real options that the respondent had itself considered and more importantly, acted upon. The respondent has embarked on a course of action against the principal borrower before the Higher People's Court in Liaoning Province in China. That China suit is pending. Although this ground is now abandoned in these proceedings, the existence of this course of conduct on the part of the respondent cannot be ignored.

[36] As for the realisation of securities, while the respondent is entitled to not realise those assets before it enforces against the appellant, the value of the securities are not seriously challenged. These securities are substantial with forced sale values which are certainly more than adequate to satisfy the judgment debt. The forced sale value is RM890,080,200 as opposed to the market value of RM1,112,728,800 as opined in the valuation report commissioned by the appellant and dated 25 August 2009. The judgment debt stands at USD78,249,610.85 together with interest at the rate of 5%pa from 2 August 2012 to the date of full realisation.

[37] With bankruptcy proceedings really as a matter of last resort, these reasons relied on by the appellant are more than sufficient reasons to warrant a stay of the bankruptcy proceedings against the person of the appellant. Although the bankruptcy court had acknowledged the existence of two tests, it failed to appreciate that the s 97 test was in effect a lower test than a 'special circumstances' test. Ultimately, the bankruptcy court applied a 'special circumstances' test and that it is in principle, erroneous warranting appellate intervention.

[38] The bankruptcy court further failed to appreciate that hardship will surely ensue to the appellant. Like the circumstances in *Re Tosrin Jarvanthi* , the China suit is already afoot although none have been taken in respect of the

securities. The realisation of the securities will surely address the judgment debt.

[39] The setting of a lower standard in s 97 is intended to protect debtors such as the appellant. Where the debtor has shown to the court that the values of the securities are more than adequate to satisfy the judgment debt, it behoves on the respondent, as judgment creditor to show some evidence or explanation that the values relied on are either wrong, inadequate or for some other reason, not relevant. To merely express that it is entitled to commence bankruptcy proceedings without more, in our judgment, will be to render the object and intent of s 97, which is to protect the debtor, illusory and of no real and substantive effect or meaning. Bankruptcy proceedings, being personal in nature must be courses of action of the last and final resort; not the first. It, therefore, stands to reason that the realisation of the valuable securities would be the immediate and more effective mode of execution towards satisfaction of a judgment debt, even if the contract has given the respondent the option of whether or not to proceed. In our view, contractual rights ought to be read subject to statutory provisions.

[40] For all these reasons, we are compelled to intervene. The appeal is accordingly allowed and the decision of the bankruptcy court is hereby set aside. A stay in terms of prayer (b), as amended, is hereby ordered with costs in the cause.

Appeal allowed and decision of the High Court set aside with costs in the cause.

Reported by Dzulqarnain Ab Fatar